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No. 88-1847

In The

Supreme Court of the United States

October Term, 1988

FORD MOTOR CREDIT COMPANY,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The Department of Revenue, State of Florida ("DOR") charges that Ford Motor Credit Company ("FMCC") and the Amici Curiae have misstated the questions presented. DOR then restates the questions in a manner that emphasizes its contention that the intangibles subjected to Florida's tax have a Florida situs and have never entered into the stream of interstate commerce. In this brief FMCC will demonstrate that DOR's position based on an assumed Florida situs of the intangibles is fallacious, and that FMCC has correctly stated the questions as follows:

1. Whether Florida's district court of appeal can create an exception to the internal consistency test promulgated by this Court that applies on a *per se* basis to intangible property taxes.

2. Whether a tax which has multiple bases for application and which potentially subjects intangible property owners engaged in interstate commerce to double taxation violates the internal consistency doctrine.

In addition to presenting reply argument on those questions, FMCC will address the two preliminary issues raised by DOR:

1. Whether FMCC's right of review by direct appeal under 28 U.S.C. §1257 (1982) is preserved by the amendment adopted by Pub.L. 100-352, §§3, 7, 102 Stat. 662 (1988); and

2. Whether FMCC, as a non-domiciliary, has standing to challenge Florida's intangible tax law.

PARTIES

The parties are those named in the caption of this brief. The correct designation of the appellant is Ford Motor Credit Company, without the added "Inc." as erroneously indicated in the Jurisdictional Statement. The correct designation of the appellee is Department of Revenue, State of Florida. The status of FMCC's affiliates and subsidiaries remains the same as stated in the Jurisdictional Statement.

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ARGUMENT OF REASONS WHY THE MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED

I

FMCC'S RIGHT OF APPEAL TO THIS COURT WAS PRESERVED BY THE PUBLIC LAW EFFECTING THE 1988 AMENDMENT TO 28 U.S.C. §1257.

DOR's contention that this Court lacks jurisdiction over this appeal is baseless. The amendment to 28 U.S.C. §1257, which eliminated this Court's jurisdiction to entertain appeals from state court judgments, became effective on September 25, 1988. Pub. L. 100-352 §§3, 7, 102 Stat. 662 (1988). The enactment, however, specifically provides that the amendment does not "affect the right to review or the manner of reviewing the judgment or decree of a court which was *entered* before such effective date." Pub. L. 100-352 102 Stat. 662 (1988) (emphasis added). The judgment of the District Court of Appeals of Florida, First District, hereinafter referred to as the DCA, on review in the instant case was entered on September 13, 1988, 12 days prior to the effective date of the statutory amendment.

DOR argues that because the DCA's decision was not "final" according to Florida law until disposition of FMCC's motion for rehearing on October 12, 1988, the decision was also not "entered" until that date. This contention is meritless. In Florida, whether the judgment of a court is final for appellate purposes, i.e. "rendered," has nothing to do with whether that judgment has been entered. *See* Fla.R.Civ.P. 1.530. Although the DCA's decision may not have been final on September 13, 1988, it was indeed "entered" on that date.

Supreme Court Rule 11, which dictates the time for taking an appeal in this Court, clearly contemplates that a judgment can be entered yet not meet the "finality" requirement essential to this Court's jurisdiction. For example, Rule 11.1 requires that an appeal to review the

judgment of a state court in a criminal case must be taken within 90 days after "the entry of such judgment." Upon construing the older version of the rule which differed merely by prescribing a 30 rather than 90 day period, this Court in *United States v. Healy*, 376 U.S. 75 (1964), recognized that the filing of a motion for rehearing of a state court judgment does not affect the date upon which that state court judgment is entered. The issue stated by this Court in *Healy* was whether the 30 day period prescribed by former Rule 11 "begins to run from the date of entry of judgment or the denial of the petition for rehearing." *Id.* at 78. This Court ultimately held that the time period began to run from the denial of the petition for rehearing. Thus, although the judgment was not final for purposes of this Court's appellate jurisdiction until the denial of the petition of rehearing, the judgment was "entered" long before it became final.

Had Congress intended that the amendment to 28 U.S.C. §1257 should not affect only those judgments which were "final", rather than "entered", before September 25, 1988, it presumably would have stated so. As the judgment of the DCA was entered 12 days prior to the effective date of the statutory amendment, the amendment has no effect on FMCC's ability to appeal the DCA's decision to this Court.

Equally non-compelling is DOR's argument that FMCC's attempt to invoke the discretionary jurisdiction of the Supreme Court of Florida somehow affected this Court's appeal jurisdiction over the DCA's decision. Although FMCC did attempt to invoke the discretionary jurisdiction of the Supreme Court of Florida, that court declined to accept the case. This Court has consistently recognized that when a higher court declines to exercise its discretionary authority, the judgment of the intermediate court, rather than the order of refusal by the higher court, is the judgment reviewable under 28 U.S.C. §1257. *Michigan-Wis. Pipeline Co. v. Calbert*, 347 U.S. 157, 159-160 (1954); *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951); *American Ry. Express v. Levee*, 263 U.S. 19, 20-21 (1923).

In the instant case, it is the judgment of the DCA, and not the order of the Supreme Court of Florida, which is the subject of this Court's appellate jurisdiction. As previously discussed, the DCA's judgment was entered on September 13, 1988, before the effective date of the amendment to 28 U.S.C. §1257. The fact that the Supreme Court of Florida declined to accept jurisdiction over the DCA's judgment after the effective date of the amendment, has no bearing whatsoever on whether this Court is vested with jurisdiction of this appeal pursuant to 28 U.S.C. §1257(2) (1982). This Court properly has jurisdiction over the DCA's decision entered September 13, 1988.

II

DOR'S ARGUMENTS THAT FMCC'S INTANGIBLES HAD A LEGITIMATE TAXABLE SITUS IN FLORIDA AND NEVER ENTERED THE STREAM OF INTERSTATE COMMERCE LACK MERIT AND DO NOT REFUTE THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION IN THIS CASE.

DOR's argument that this case involves no substantial federal question rests mainly on variations of a single recurrent theme regarding "situs" of the intangibles subject to the tax. DOR repeatedly contends that FMCC's intangible property had an "actual business situs", or a "legitimate situs" in Florida alone, that the intangibles never crossed state lines to enter the stream of interstate commerce and that Florida restricted its tax to intangible property "actually located" at all pertinent times within its geographical boundaries. In its motion, DOR asserts that Florida is the "actual" situs of the intangibles, as opposed to "a fictional domiciliary situs". (DOR's motion, pp.17, 39).

Those arguments are fallacious. Although the situs of taxable property can be an important factor in deciding

whether a tax complies with due process, this Court has established that locale is not determinative of a tax dispute arising out of the commerce clause. In *Nippert v. Richmond*, 327 U.S. 416, 423-424 (1946), this Court noted that while every tax affecting interstate commerce has some local aspect, it does not follow that a taxing authority may use "mental gymnastics" to make that local aspect a "fulcrum" for a tax which would discriminate against interstate commerce.

The cases cited by DOR offer no support for the imposition of a "locality" test as suggested by DOR. In each, the property which was the subject of the tax was merely "passing through" the taxing state. *Minnesota v. Blasius*, 290 U.S. 1 (1933); *General Oil Co. v. Crain*, 209 U.S. 211 (1908). It has long been held that even nondiscriminatory property taxes on goods which are merely in transit through a state are invalid. *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The issue in both *Minnesota v. Blasius* and *General Oil Co. v. Crain* was whether the goods were in transit, thereby rendering the tax invalid. The issue of whether the tax was discriminatory was neither relevant nor raised. Therefore, those cases have no application here. This Court has long held that a state tax is not "immune from commerce clause scrutiny" simply because it attaches to only local or intrastate activity. Rather, the Court's goal has been "to establish a consistent and rational method of inquiry focusing on the practical effect of a challenged tax." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981).

DOR's argument that the "internal consistency test" is applicable only in those cases requiring apportionment of business income (DOR's motion, p. 50), is the same argument rejected by this Court in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). "Prior to *Armco*, the internal consistency test was applied only in cases involving apportionment of the net income of businesses that more than one State sought to tax." *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. ___, 97 L.Ed.2d 199, 219 (1987)

(J. Scalia, dissenting). In *Armco*, however, the Court promoted the "internal consistency test" to a rule generally applied to any tax which discriminates in violation of the commerce clause:

> In [*Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983)], the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. *A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce.*

Armco, 467 U.S. at 644 (emphasis added).

The cases of *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. ___, 97 L.Ed.2d 226, (1987) and *Tyler Pipe*, are other clear and recent examples of this Court's application of the internal consistency test to taxing schemes other than those taxing business income.

In *D.H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. ___, 100 L.Ed.2d 21 (1988) this Court once again recognized that multiple taxation which discriminates against interstate business violates the commerce clause. The Court, however, found that Louisiana's use tax on personal property had no discriminatory effect on interstate commerce because the Louisiana legislature had provided a mechanism which guarded against multiple taxation of the same property:

> The Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States. . . . Holmes paid no sales tax for the catalogs where they were designed or printed; if it had, it would have been eligible for a credit against the use tax exacted.

D.H. Holmes Co., Ltd. v. McNamara, 100 L.Ed.2d at 28.

Implicit in the Court's holding is that if Louisiana had *not* provided a credit against taxes imposed by other states, Louisiana's tax *would* violate the commerce clause. In *D.H. Holmes*, the Court also discounted the importance of whether the catalogs were still in interstate commerce

once delivered to Louisiana mailboxes, noting that the factor was "largely irrelevant" for commerce clause purposes. *Id.*, 100 L.Ed. at 27. In the instant case, Florida's intangible property tax is imposed on property which, by mandate of the internal consistency test, is presumed also to be taxed by Michigan. Florida has made no provision for a credit which would fairly apportion its tax. Florida's taxing scheme lacks all the qualities upon which Louisiana's tax was held to be valid. FMCC's intangible property is fully taxed by Florida despite the irrebutable presumption that it is also taxed by Michigan. Florida's taxing scheme is not fairly apportioned and, therefore, discriminates against interstate commerce.

DOR's argument that a "locality" test should apply rather than the "internal consistency test" is not only contrary to the most recent pronouncements of this Court, but also is logically incapable of being applied to the instant case. DOR's argument ignores the long established principle that intangible property, by its incorporeal nature, has no physical situs. *See Handley v. Malden*, 232 U.S. 1, 11 (1914).

Because intangible property has no real situs for taxing purposes, "intangibles generally are reached by the tax gatherers through the assertion of the power of the taxing state over the person of those who have some legal interest in the intangibles." P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 43 (1981). Thus, when a person with an interest in intangible property crosses state lines, the basis for the authority to tax has crossed state lines. "A state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs within the state." *Armco*, 467 U.S. at 545. Yet Florida's taxing scheme does just that: In violation of the internal consistency test, it exposes the taxpayer to multiple taxes on intangible property arising from interstate transactions, while insuring that there will be only a single tax on intangible property arising from purely intra-Florida transactions. Both the applicability and the

violation of the internal consistency test could hardly be clearer.

It is only through the contrived provisions of the Florida statute under review that the DOR can claim that the intangible assets are "located" within Florida's geographical boundaries. Only by a legal fiction can any locale be assigned to an intangible asset.

In its effort to establish a "business situs" which does not cross state lines, DOR relies on Florida Statute §199.112 (1983), which conveniently provided that all intangible property "issued in connection with the sale, leasing, or servicing of real or personal property in this state shall be deemed to have a Florida business situs and shall thus be subject to taxation under this chapter." (DOR's motion, p. 26). In fact, however, the statutory criteria are plainly based on transactions that are inherently interstate in character. The tax is imposed on obligations arising out of the sale, leasing or servicing of real or personal property in the state, regardless of where the obligations are kept, approved or paid. Additionally, Florida law provides that sales of tangible personal property are deemed to be Florida sales for purposes of the intangible property tax if the tangible property is delivered or shipped to a purchaser in Florida, regardless of f.o.b. point or conditions of sale. §199.112(1), Fla. Stat. (1983). This provision, by its very nature, can apply only to sales which occur in interstate commerce.

According to DOR's theory, Florida can, by the device of contrived legal definition, transform an inherently interstate transaction into a purely local taxable event – the ownership of Florida-based intangible property. To permit such a contrivance would thwart the intent and purpose of the commerce clause as interpreted by this Court. This Court has expressly rejected essentially the same argument being made by DOR. In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 445 (1980), the Court held that a state-created fictional business situs

of intangible property does not control the issue of taxability.

If one peels back the artificial veneer of a Florida business situs, the interstate nature of a non-domiciliary's ownership of intangible property becomes apparent. Florida's taxing scheme automatically provides that intangible assets have a Florida situs if those assets arise from property sold or leased in Florida, or if the tangible property from which they are derived is shipped to Florida. This rule applies regardless of where documents creating the intangible assets are kept, approved, or paid, and regardless of the point of transfer of title of the underlying tangible property. Based on nothing more than "an act of mental gymnastics," the Florida scheme creates a fixed legal situs for intangible property as a single "fulcrum" for the tax, thereby subjecting the property to discriminatory multiple taxation. *See Nippert*, 327 U.S. at 423. Where, as here, Florida deems the legal existence of an intangible asset to be solely in Florida, it is inevitable that Florida will tax that intangible asset without regard to any tax imposed by the domiciliary state. There is no basis in the Florida taxing scheme for doing otherwise.

DOR does not even attempt to argue that Florida's taxing scheme does not discriminate against interstate commerce by permitting multi-state taxation of the full value of the same intangible asset. Rather, DOR contends in effect that the courts must close their eyes to that discrimination because of a legal fiction that the intangible asset does not cross state lines.

III

FMCC, AS A NON-DOMICILIARY FLORIDA TAXPAYER, HAS STANDING TO CHALLENGE FLORIDA'S INTANGIBLE TAX UNDER THE COMMERCE CLAUSE, BASED ON THE POTENTIAL FOR DOUBLE TAXATION AND NON-COMPLIANCE WITH THE INTERNAL CONSISTENCY TEST.

DOR's argument that FMCC has no standing to challenge those portions of Florida's tax which pertain to the taxation of a Florida domiciliary corporation is irrelevant as FMCC is not challenging any tax imposed on a Florida domiciliary. It is, however, the very existence of those portions of the intangible tax which render the taxing scheme discriminatory and, therefore, unconstitutional. Thus it is necessary to examine those portions of Florida's tax for compliance with the internal consistency test, which invalidates any taxing scheme which, if adopted by all other states, would result in discriminatory taxation. Since it is Florida's intangible taxing scheme taken as a whole which discriminates against interstate business, FMCC has standing to challenge the tax. As best stated by this Court:

> [T]he wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. *The wholesalers plainly have standing to challenge the tax in this Court.*

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267 (1984) (footnote omitted, emphasis added).

DOR further argues that this Court should refrain from reviewing the constitutionality of the Florida statute because double taxation has not been established in the record and is only a "hypothetical" possibility. (DOR's motion, p. 55). This argument, however, ignores the very premise of the internal consistency test. As recently reaffirmed by this Court, it is the *possibility* of discriminatory

double taxation which renders a tax violative of the commerce clause:

> To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.

Goldberg v. Sweet, 488 U.S. ___, 102 L.Ed.2d 607, 617 (1989) (citation omitted). FMCC certainly has standing to present to this Court the controversy at bar.

CONCLUSION

For the foregoing reasons, this Court should deny the Motion to Dismiss or Affirm and note probable jurisdiction of this appeal.

Respectfully submitted,

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